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Letter Ruling 08-5: Sales of Reports of Individualized Information - G.L. c. 64H, s. 1, "sales" and "selling"

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March 24, 2008

In your letter of December 31, 2007, you seek a ruling on the taxability of the sales of your client, ***** as more fully described below. You ask us to assume that ***** has substantial nexus with Massachusetts and must collect sales and use taxes on any taxable transactions.

Description of Services

The following description of ***** activities is drawn directly from your letter, in which you state that ***** provides services over the Internet by gathering data and housing data about customers' web sites that customers use to manage and enhance on-line, off-line, and multi-channel business initiatives.

***** may gather the following information concerning a customer's Web site:

- The number of different users who visit the site;
- The number of times the same user visits the site;
- The average length of time a user spends on the site;
- What Web pages are viewed the most; and
- The number of times a particular product is added to visitors' shopping carts.

***** provides its customers with informational reports that are created using the data captured by ***** and accessed using on-line applications developed by ***** . The information is accessed through a standard Web browser, which may have simple software installed on the customer's server at no additional cost to the customer. This software is incidental to the service and merely aids in the tracking and transmission of the information to ***** servers for data capture and processing. No other software is downloaded or delivered electronically to customers.

The customer neither operates, directs, nor controls the software, but may choose from five service options. The core service option, ***** allows customers to access their information through an on-line application that provides a flexible, customizable interface to analyze and manage the information collected regarding interactions on customers' Web sites. Another service option, ***** provides customers with access to all of their data for real-time reporting analysis of historical and current information. A third service option, ***** supplements other service

options by providing customers with the ability to perform a deeper analysis and segmentation of the customer's data. Fourth, ***** is a plug-and-play, wizard-based interface that walks the user through pre-configured application integrations, automating the integration of third-party marketing applications into ***** . Finally, ***** allows customers to integrate their paid search engine advertising activities with ***** and ***** , ***** allowing better matching of keywords with ads and providing more detailed information to improve the keyword bidding process. In ***** view, none of these service options has independent value outside of extracting and manipulating the customer-specific data ***** .

Each new customer must elect what data ***** will capture from the customer's Web sites. Some customers focus on which pages are viewed the most, whereas other customers are interested in which products are added to shopping baskets the most. Each customer arrangement is a unique and custom relationship, and the information gathered by ***** is unique and proprietary to each customer, and is not incorporated into reports made available to other customers.

Customers are generally charged a fee based on the amount of data captured. The fee is not dependent upon the number of users or how often customers access the data, but is based instead on the number of screen captures ***** performs on the customer's Web sites, or the level of the customer's on-line advertising spending, and the data service options used by the customer to access the information. For example, customers must purchase ***** as a minimum service level. If customers want more features, they may add them for an additional charge; if the number of screen captures in a given month exceeds the contracted maximum number of screen captures, there may be additional fees.

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***** contends that its services are not subject to sales/use tax. Under Massachusetts law, sales of reports or other information on printed matter or magnetic media, sold or intended to be sold to two or more purchasers are generally taxable. See G.L. c. 64H, § 1, "Sale" Such reports may reflect collection, compilation, or analysis of information. Examples include database files, mailing lists, market research, and surveys. 830 CMR 64H.1.3(8)(a). In addition, charges for the access or use of software on a remote server are generally subject to tax. 830 CMR 64H.1.3(14)(a).

There are, however, exceptions to both of these general rules. First, "the sale of a report of individual information, whether printed or on magnetic media, is not taxable if the report may not be or is not substantially incorporated into reports furnished to other persons." G.L. c. 64H, § 1, "sale"; 830 CMR 64H.1.3(8)(b). Second, charges for accessing and using software are not taxable if the object of the transaction is acquiring a good or service other than the use of the software and there is no charge for the software. 830 CMR 64H.1.3(14).

Discussion and Analysis

***** asserts that its sales are nontaxable services. We agree. ***** is providing information services based on data it gathers on the traffic at and use of its individual customers' Web sites. ***** then provides this information to its customers in various formats and levels of detail depending on which service options a customer chooses, but the information is proprietary in nature, and ***** states that it may not be accessed by or sold to other customers, and is not substantially incorporated into reports to customers other than the customer requesting the services. In addition, customers, at no additional cost, use ***** on-line applications to view, customize, and analyze the customers' own data. As the information available on line is the object of the transaction, not the use of the software *per se*, no taxable sale or use of the software occurs.

Ruling

Where any form of pre-written software is involved in a transaction, the question of taxability depends upon the particular facts and circumstances. In making such determinations the Department will consider whether the company or the customer operates, directs, or controls the pre-written software. Here, ***** rather than its customers does so. In light of the above, we rule (1) that ***** gathers information for individual customers for whom it also provides individualized

reports. As these reports may not or are not substantially incorporated into reports furnished to others, provision of the reports is not taxable, regardless of the medium on which they are delivered. In addition, (2) the object of the customers' use of ***** services is obtaining customized reports prepared by *****, rather than the use of the software itself. Charges for ***** services are therefore not taxable under the particular circumstances described.

Very truly yours,

/s/Navjeet K. Bal

Navjeet K. Bal
Commissioner of Revenue

NKB:MTF:lr

LR 08-5